RE ABU BAKAR PC KUAYA; EX P NAVARATNAM SIVASAMBOO

HIGH COURT MALAYA, KUANTAN
RAMLY ALI JC
[BANKRUPTCY NO: 29-185-1996]
3 JANUARY 2002

CIVIL PROCEDURE: *Appeal - Appeal from registrar - Ruling by deputy registrar - Whether a "decision" under s. 3 of Courts of Judicature Act 1964 - Whether appealable under O. 56 r. 1 of Rules of the High Court 1980*

BANKRUPTCY: *Practice and procedure - Costs - Bankruptcy proceedings - Applicable provisions - Whether r. 69 of Bankruptcy Rules 1969 or O. 59 r. 4(1) of Rules of the High Court 1980 to apply*

CIVIL PROCEDURE: *Costs - Taxation - Preliminary objection overruled and dismissed with costs in the cause - Whether could be dealt with at conclusion of application - Application dismissed with costs - Bankruptcy Rules 1969, r. 69(1) - Whether costs to follow event - Whether bill of costs to be taxed at the end of each application*

The judgment creditor ('the respondent') issued a bankruptcy notice against the judgment debtor ('the appellant'). The appellant filed an affidavit *vide* encl. 5A to set aside the bankruptcy notice. Before the matter was heard, on 5 November 1996 he raised a preliminary objection to the effect that the said bankruptcy notice was void *ab initio*. The senior assistant registrar ('SAR') dismissed the preliminary objection with costs in the cause (the first order). Subsequently, encl. 5A was heard on 4 August 1997 and the application was dismissed with costs (the second order). The appellant appealed against both decisions to the judge in chambers. The first appeal was dismissed with costs (the third order). Before the second appeal was heard, the appellant applied to adduce further evidence before the said judge but this was dismissed with costs (the fourth order). When the second appeal was heard, it was struck off with costs (the fifth order) upon the appellant's withdrawal of the said matter.

Based on the above, the respondent filed a notice together with the bill of costs to be taxed by the SAR. The appellant raised a preliminary objection against the said notice and bill of costs. This was overruled by the deputy registrar and dismissed with costs. This was an appeal against the said decision.

Relying upon s. 3 of the Courts of Judicature Act 1964 ('the CJA'), the respondent contended, *inter alia*, that the matter was not appealable.

The appellant submitted that the hearing for notice and bill of costs must be determined after the final disposal of the bankruptcy proceeding. Citing r. 276 of the Bankruptcy Rules 1969 ('the Rules'), he contended that r. 69 of the

Rules must be read together with O. 59 r. 4 of the Rules of the High Court 1980 ('the RHC') which in effect meant that costs must only be billed and taxed at the conclusion of the bankruptcy proceedings.

Held:

[1] The word "decision" under s. 3 of the CJA referred to judgment, sentence or order but excluded any ruling made in the course of a trial or hearing of any cause or matter which did not finally dispose of the rights of the parties. (p 386 b)

[1a] The ruling of the deputy registrar in the present case did not deal with the final rights of the parties and gave no final decision on the main issue in dispute, but was merely on a matter of procedure. Thus, it was not appealable under O. 56 r. 1 of the Rules. Based on this ground alone, the present appeal should be dismissed with costs. (pp 386 f-g & 387 a)

[2] In a bankruptcy proceeding, issues relating to costs are to be found under rr. 69-88 of the Rules. However, in the event of a *lacunae*, r. 276 provides that reference could be had to the Rules of the High Court 1980. (p 387 c)

[2a] Order 59 r. 4(1) of the RHC was inapplicable here as it did not state that the costs shall only be taxed at the end of the proceedings. Under the said provision, the court has the discretion to deal with the question of costs at any stage of the proceedings or after the conclusion of the proceedings. It was not open to the appellant to seek an interpretation that would suit him. (p 387 h)

[2b] Additionally, O. 59 r. 4(1) of the RHC was not applicable as there was no lacunae here in that s. 75 of the Bankruptcy Act 1967 and rr. 69-88 of the Rules provide express and specific provisions relating to costs in bankruptcy proceedings. Under r. 69(2), it was clearly indicated that unless the court otherwise directs, the costs of an opposed application shall follow the event, ie at the end of each particular application, not at the conclusion of the main action. (p 388 c-e)

[3] When the deputy registrar made an order for costs in the cause with regard to the first order, ie, on 5 November 1996, it meant that the costs of preliminary objection made on that date must be included in the cost of the appellant's application to set aside the bankruptcy notice on 4 August 1997. Therefore, when the court ordered the latter application to be dismissed with costs, both the costs awarded could be dealt with and taxed at the end of the application. (p 389 d-e)

[3a] The second to the fifth orders involved applications dismissed with costs. Therefore, under r. 69(1) of the Rules, these costs shall follow event, ie, they could be dealt with at the end of each application. The respondent need not have to wait until the conclusion of the bankruptcy petition to have the bill of costs taxed. (pp 388 h & 389 a)

[Appeal dismissed with costs.]

Case(s) referred to:
Dato' Seri Anwar Ibrahim v. PP [1999] 1 CLJ 537 ***(foll)***
Re A Debtor [1948] 2 All ER 533 ***(foll)***
Saad Abas & Anor v. PP [1998] 4 CLJ 575 ***(foll)***
Tetuan J&S Holdings Sdn Bhd v. A Karim Hasan & Anor [2000] 4 CLJ 152 ***(foll)***

Legislation referred to:
Bankruptcy Act 1967, s. 75
Bankruptcy Rules 1969, rr. 69(1), (2), 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 95, 276
Courts of Judicature Act 1964, s. 3
Rules of High Court 1980, O. 56 r. 1, O. 59 r. 4(1)

For the appellant - R Sarengapani; M/s Vendargon & Partners
For the respondent - Kong Yit Har; M/s Siva Ram & Kong

Reported by M Maheswaran

JUDGMENT

Ramly Ali JC:
This is an appeal by the appellant ("judgment debtor") (*vide* encl. 31), against the decision of the learned deputy registrar made on 11 September 2001 whereby the learned deputy registrar has dismissed the appellant's preliminary objection in respect of a notice (notis penetapan kes) filed by the respondent ("judgment creditor") (*vide* encl. 27). The said notice and the related bill of costs was fixed for hearing before the learned deputy registrar on 11 September 2001. Before the hearing, the counsel for the appellant had raised a preliminary objection to the effect that the whole bankruptcy proceedings has not been completed yet and that there is no order to the effect that costs must be paid forthwith; therefore the hearing of the notice as well as the bill of costs (as in encl. 27) must be deferred until the final conclusion of the bankruptcy proceedings. The learned deputy registrar overruled and dismissed the said preliminary objection and proceeded to hear the notice as well as the bills of costs. The appellant was not satisfied with the said decision and hence the appeal.

Brief Background Of The Case

The respondent issued a bankruptcy notice against the appellant which was served on the appellant on 25 April 1996 *vide* Bankruptcy Notice No. 29-185-96. On 2 May 1996, *vide* encl. 5A, the appellant filed an affidavit under r. 95 of the Bankruptcy Rules 1969 to set aside the bankruptcy notice. On 5 November 1996 the appellant raised a preliminary objection (before hearing of encl. 5A) to the effect that the said bankruptcy notice was void "*ab initio*". The said preliminary objection was overruled and dismissed with costs by the then senior assistant registrar. The learned assistant registrar also made an order that costs shall be in the cause. Enclosure 5A was then heard by the learned senior assistant registrar and on 4 August 1997 he dismissed the application with costs. The appellant then appealed against the said decisions of the senior assistant registrar to the judge in chambers *vide* encl. 11A and encl. 15 (against the decisions of the senior assistant registrar made on 5 November 1996 and 4 August 1997). The first appeal (encl. 11A) was dismissed with costs by the judge in chambers. Before the hearing of the second appeal (encl. 15), the appellant filed another application (*vide* encl. 25C) for the purpose of adducing further evidence before the judge. This application was also dismissed with costs by the judge. The second appeal (encl. 15) came for hearing on 8 August 2000. The appellant withdrew the appeal. The judge then struck off the appeal with costs. Based on all those orders made by the senior assistant registrar and the judge in respect of costs against the appellant, the respondent filed a notice (encl. 27) together with bill of costs to be taxed by the learned deputy registrar. The appellant's preliminary objection against the said notice and bill of costs was overruled and dismissed with costs and the learned deputy registrar proceeded to deal with the matter accordingly. The said dismissal of the appellant's preliminary objection is the subject matter of the present appeal.

Appellant's Arguments

The appellant argued that the bankruptcy proceeding initiated by the respondent against the appellant has not been completed yet; therefore the hearing of the notice and bill of costs must be deferred until the final disposal of the bankruptcy proceedings ie, when the bankruptcy petition is filed, heard and finally an adjudication order and receiving order are made by the court against the appellant. In the present case, the bankruptcy petition against the appellant has not been filed yet by the respondent. The appellant further argued that there is no provision for costs to be taxed unless it is made at the stage of the petition, not before that. The appellant cited that r. 69 of the Bankruptcy Rules 1969 must be read together with O. 59 r. 4 of the High Court Rules ('RHC') 1980 and r. 276 of the Bankruptcy Rules 1969, to the effect that unless there is an express order made by the court that costs shall be paid forthwith, then the costs must only be billed and taxed at the conclusion of the bankruptcy proceedings.

Respondent's Arguments

To counter the appellant's arguments, the respondent had raised three issues ie,:

(i) that the ruling made by the learned deputy registrar on 11 September 2001 in dismissing the appellant's preliminary objection is not a "decision" as defined under s. 3 of the Courts of Judicature Act 1964, and thus not appealable;

(ii) that O. 59 r. 4, RHC 1980 is not applicable to bankruptcy matters; the relevant and applicable rules in the present case are provided under the Bankruptcy Act 1967 and Bankruptcy Rules 1969;

(iii) that taxation on bill of costs in the present case can be made at any interlocutory stage without having to wait until the final disposal of the bankruptcy petition.

Findings Of The Court

The issues to be decided by the court in the present appeal are as raised by the respondent in their arguments. I shall now deal with the issues one by one.

(i) Whether the learned deputy registrar's ruling made on 11 September 2001 is appealable

The relevant ruling made by the learned deputy registrar on 11 September 2001, which is the subject matter of the appeal, arises from a preliminary objection made by the appellant. The appellant's preliminary objection was overruled and dismissed by the learned deputy registrar. The effect of the ruling is that the court shall proceed to hear the respondent's applications for taxation of costs awarded in their favour against the appellant in a number of interlocutory applications since 1996, and not to defer the hearing until the final disposal of the bankruptcy petition which has not been filed yet by the respondent. The ruling made is not a final decision on the question of taxation of costs. To rule that the court shall proceed to hear the respondent's application for taxation of costs as earlier fixed in the notice does not determine the issues at hand in taxation of costs as applied. Both parties still have the chance to argue their respective cases during the hearing before the final decision on the taxation of costs is made. The ruling does not in any way finally dispose the rights of the parties.

The right of appeal must be based on express provisions of law. NH Chan JCA in *Dato' Seri Anwar Ibrahim v. PP* [1999] 1 CLJ 537 has said:

> There is no right of appeal at law from a decision of a court to any other court unless there is a statutory provision which gives a right to appeal.

In the present case, the appeal is against the decision of the learned deputy registrar to the judge in chambers. Order 56 r. 1, RHC 1980 provides:

> (1) An appeal shall lie to a Judge in Chambers from any judgment, order or decision of the Registrar.

The word "decision" as defined under s. 3 of the Courts of Judicature Act 1964 (as amended by Act A 1031 in 1998) means "judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties."

In *Dato' Seri Anwar Ibrahim*'s case *(supra)*, the Court of Appeal has ruled that "what the 1998 amendment means is that, a judgment or order which does not deal with the final rights of the parties, but is made *pendente lite*, and gives no final decision on the matters in dispute, is not a "decision" within the meaning of that word in the current version of s. 3 of the Courts of Judicature Act, and therefore is not appealable. It makes no difference that such a judgment or order is final, that is to say conclusive, as to the subordinate matter which it deals."

In another Court of Appeal case, *Saad Abas & Anor v. PP* [1998] 4 CLJ 575 Lamin Mohd Yunus PCA has also ruled that:

> Be that as it may, whether it is a judgment, decision or order pronounced by a court, there must be an element of finality before there can be an appeal.

Even though both the above cases (*Dato' Seri Anwar Ibrahim* and *Saad Abas*) are criminal in nature, but the interpretation of the words "decision, judgment and order" in those cases is also applicable to civil cases such as in the present appeal. The interpretation involves the definition of the word "decision" as found in s. 3 of the Courts of Judicature Act 1964. The ruling of the learned deputy registrar in the present case does not deal with the final rights of the parties, and gives no final decision on the main issue in dispute, but is merely on a matter of procedure. Therefore I am convinced that the said ruling is not a "decision" as defined under s. 3 of the Courts of Judicature Act; and therefore not appealable under O. 56 r. 1, RHC 1980.

In this respect, I am in full agreement with VT Singham JC in *Tetuan J&S Holdings Sdn Bhd v. A Karim bin Hasan & Anor* [2000] 4 CLJ 152, when he said:

> The Court is of the view that if a party is allowed to appeal against a ruling or decision made on a preliminary objection before the start of a trial or during the trial which decision does not determine or finally dispose of the rights of the parties as spelt out in section 3 of the Courts of Judicature Act 1964, the

> High Courts will be flooded with appeals and have to deal with those appeals as speedily as possible in order not to prolong the trial in the lower courts which will be pending the outcome of the appeal.

Based on the above considerations, I am of the view that the appellant's appeal as per encl. 31 can and should be dismissed with costs, on this ground alone.

In the event I am wrong in coming to the above conclusion, I shall now deal with the appeal on its merit.

(ii) Whether O. 59 r. 4, RHC 1980 is applicable

Bankruptcy matters are dealt with under the Bankruptcy Act 1967 and Bankruptcy Rules 1969. Matters pertaining to costs in bankruptcy proceedings are dealt with under rr. 69-88 of the Bankruptcy Rules 1969. However, r. 276 of the said Rules provides that the Rules of the High Court shall be applicable to bankruptcy proceedings in the event of *lacunae*. Rule 276 provides:

> In the absence of any rule regulating any proceeding under the Act or these Rules, the Rules of the High Court shall apply, *mutatis mutandis*.

Relevant to the present appeal, r. 69(2) of the Bankruptcy Rules 1969, provides:

> (2) Unless the Court otherwise directs, the costs of an opposed application shall follow the event and shall be taxed as between party and party.

On the other hand, O. 59 r. 4(1), RHC 1980 provides:

> (1) 'Costs' may be dealt with by the Court at any stage of the proceedings or after the conclusion of the proceedings; and any order of the Court for the payment of any costs may, if the Court thinks fit, requires the costs to be paid forthwith notwithstanding that the proceedings have not been concluded.

The appellant argues that by virtue of r. 276 of the Bankruptcy Rules 1969, O. 59 r. 4(1) RHC 1980 should be applicable to the present case and contended that under the said O. 59, unless the order expressly provides that the costs must be paid forthwith, then the costs ordered must be taxed at the end or the conclusion of the bankruptcy petition against the appellant. With respect, I cannot agree with the appellant's argument on this issue. Firstly, O. 59 r. 4(1), RHC 1980 does not specifically support the appellant's contention. There is nothing in the said order to say that costs shall only be taxed at the end of the proceedings. In actual fact, the said order gives the power to the court to use its discretion to deal with the question of costs at any stage of the proceedings or after the conclusion of the proceedings. The appellant

cannot adopt his own interpretation just to suit his own taste. It is trite that any interpretation must not be contrary to the clear wordings of the statute. This principle had been laid down by Lord Greene MR in *Re A Debtor* [1948] 2 All ER 533 (at p. 536) when he said:

> There is one rule of construction for statutes and other documents, it is that you must not imply anything in them which is inconsistent with the words expressly used.

Secondly, I am of the view that O. 59 r. 4(1) RHC 1980 is not applicable to the present bankruptcy proceedings. The strength of the appellant's argument is that O. 59 r. 4(1) RHC 1980 is applicable by virtue of r. 276 of the Bankruptcy Rules 1969. The key words in r. 276 is "in the absence of any rule regulating any proceedings under the Act or these Rules ..." Section 75 of the Bankruptcy Act 1967 and rr. 69-88 of the Bankruptcy Rules 1969 provide express and specific provisions relating to costs in bankruptcy proceedings. The most relevant provisions relating to the present case are as provided under r. 69(2) of the said Rules ie, "unless the court otherwise directs, the costs of an opposed application shall follow the event and shall be taxed as between party to party."

This rule clearly indicates that unless the court otherwise directs, the costs of an opposed application shall follow the event ie, at the end of each particular application, not at the conclusion of the main action.

Obviously the provisions of r. 69(1) of the Bankruptcy Rules 1969 differ from the provisions of O. 59 r. 4(1) RHC 1980, even though they touch on the same issue ie, at what stage of the proceedings can costs be dealt with by the court. That being the case, I am satisfied that O. 59 r. 4(1), RHC 1980 is not applicable in the present case. The applicable provisions are those of r. 69(1) of the Bankruptcy Rules 1969.

(iii) Whether taxation of bill of costs in this case can be dealt with before the conclusion of the bankruptcy petition

The applicable r. 69(1) of the Bankruptcy Rules 1969 clearly empowers the court to deal with the costs awarded at the end of each particular application. In other words, the court can entertain the respondent's application for taxation of costs as applied *vide* encl. 27. The relevant orders relating to costs made against the appellant in this case were made on 5 November 1996; 4 August 1997; 28 July 1999; 27 June 2000 and 8 August 2000. Except for the first order made on 5 November 1996, all the other four orders were made without any other direction. The orders made on all the four occasions were to the effect that "application dismissed with costs". In these circumstances it is clear

from the wordings of the r. 69(1) of the Bankruptcy Rules 1969 that these costs shall follow the event ie, can be dealt with at the end of each application. The respondent need not have to wait until the conclusion of the bankruptcy petition to have their bill of costs taxed.

As for the first order made on 5 November 1996, the order made was "costs in the cause (kos dalam kausa)". This order was in respect of the appellant's preliminary objection in relation to the appellant's application under r. 95, (encl. 5A), to set aside the bankruptcy notice issued by the respondent against the appellant. Before the hearing of the said application the appellant chose to raise a preliminary issue ie, that the said bankruptcy notice was void *ab initio*. The learned senior assistant registrar heard the preliminary objection first and dismissed with costs and ordered that the said costs be in the cause. The actual application to set aside the bankruptcy notice (encl. 5A) was adjourned to and heard on 4 August 1997 where it was also dismissed with costs. Therefore, the order made on 5 November 1996, in respect of a preliminary objection relating to encl. 5A, must relate to the main cause in encl. 5A itself. So, when the order says "costs in the cause", it means that the costs of the preliminary objection made on 5 November 1996 must be included in the costs of the application (encl. 5A) made on 4 August 1997. Therefore, when the court made an order "dismissed with costs" in respect of the application (encl. 5A) on 4 August 1997, both the costs awarded on 5 November 1996 and 4 August 1997 can be dealt with and taxed at the end of the application (encl. 5A)

Conclusion

On the above consideration, I am of the view that the appellant's appeal *vide* encl. 31 is without merit. Therefore, the appeal is dismissed with costs.